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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND ANTHONY ESTRADA,

Defendant and Appellant.

H045588

(Santa Clara County

Super. Ct. No. C1755382 )

A jury convicted defendant Raymond Anthony Estrada of making criminal threats and found true that he had suffered a prior strike conviction and a prior serious felony conviction and had served a prior prison term. The trial court sentenced defendant to a prison term of eight years eight months. That term included a consecutive five-year enhancement under Penal Code section 667, subdivision (a)(1)<sup>1</sup> for the prior serious felony conviction. On appeal, defendant requests remand for resentencing in light of recent amendments to sections 1385, subdivision (b) and 667, subdivision (a), which grant trial courts the discretion to strike prior serious felony convictions for purposes of the five-year enhancement. The People concede that remand for resentencing is warranted. We reverse and remand the matter for resentencing.

**I. BACKGROUND**

The facts of defendant's offense are not relevant to the sole issue on appeal. Accordingly, we do not summarize them here.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

On October 19, 2017, the Santa Clara County District Attorney charged defendant by information with making criminal threats in violation of section 422. The information also alleged that defendant had a prior strike offense conviction (§§ 667, subds. (b)-(i), 1170.12), had a prior serious felony conviction (§ 667, subd. (a)), and had served a prior prison term (§ 667.5, subd. (b)). Following trial, the jury found defendant guilty of making criminal threats. Following a separate trial on the prior conviction allegations, the jury found those allegations to be true.

The trial court sentenced defendant on January 29, 2018. The court imposed the low term of 16 months for the section 422 violation, which was doubled to 32 months by the prior strike. The court also imposed a consecutive five-year enhancement for the prior serious felony conviction (§ 667, subd. (a)) and a consecutive one-year enhancement for the prior prison term (§ 667.5, subd. (b)) for an aggregate term of eight years eight months.

Defendant timely appealed.

## **II. DISCUSSION**

The jury found true an allegation that defendant had suffered a prior serious felony conviction and the trial court imposed a consecutive five-year term under section 667, subdivision (a)(1), as it was statutorily required to do at the time of defendant's sentencing. (Former § 667, subd. (a)(1) ["In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively"]; former § 1385, subd. (b) ["This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667"].)

“On September 30, 2018, the Governor signed Senate Bill 1393 which, effective January 1, 2019, amends sections 667(a) and 1385(b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

As the parties agree, the amendments to sections 667, subdivision (a) and 1385, subdivision (b) apply retroactively to defendant because his case was not final at the time they took effect. (*Garcia, supra*, 28 Cal.App.5th at p. 973; *People v. Jones* (2019) 32 Cal.App.5th 267, 272; *People v. Jimenez* (2019) 32 Cal.App.5th 409, 426; see *In re Estrada* (1965) 63 Cal.2d 740, 744 [“If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies”].)

The parties further agree that remand is appropriate in this case, as do we.

“ ‘Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ [Citation.] In such circumstances, [our Supreme Court has] held that the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’ [Citations.]” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) Here, the trial court imposed the low term on the section 422 violation, rather than the middle term recommended by the Probation Department. In our view, the record does not clearly indicate that the trial court would have declined to strike defendant’s prior serious felony conviction for sentencing purposes if it had had the discretion to do so. (Cf. *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining to remand for resentencing because “the trial court indicated that it would not,

in any event, have exercised its discretion to lessen the sentence . . . by imposing two additional discretionary one-year enhancements” and describing the defendant as “ ‘the kind of individual the law was intended to keep off the street as long as possible’ ”].) Accordingly, remand is appropriate in this case to allow the trial court to exercise its discretion as to whether to strike defendant’s prior serious felony conviction for sentencing purposes.

### **III. DISPOSITION**

The judgment is reversed and the matter is remanded to the superior court with directions to resentence defendant in light of sections 667, subdivision (a) and 1385, subdivision (b), as amended by Senate Bill 1393.

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ELIA, ACTING P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.